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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

TWO JINN, INC.,

Defendant and Appellant.

C059842

(Super. Ct. No. LF009972A)

Defendant Two Jinn, Inc., acting as an agent for Lincoln General Insurance Company, posted a bond on behalf of criminal defendant, Jose Bramasco. Bramasco failed to appear in court on June 21, 2007. The court minutes reflect that bail was ordered forfeited at that time. The reporter's transcript does not reflect such a forfeiture. Defendant appeals, contending that the bond was not forfeited in open court as statutorily required and therefore, the bond should be exonerated. We agree and reverse the judgment.

STATEMENT OF FACTS

Defendant posted a \$75,000 bond on behalf of Bramasco. On June 21, 2007, Bramasco failed to appear in court as ordered. The reporter's transcript reflects defendant's absence, and defense counsel's motion to be relieved which was set for hearing on June 29, 2007. The reporter's transcript shows the hearing ending with the court stating, "And the bench warrant is now going to be released for service. Bail is [\$]150,000." The clerk's minute order mirrors the reporter's transcript, except it also includes the notation that the bail bond is forfeited. Notice of forfeiture was mailed to the surety and bail agent on June 25, 2007.

On June 10, 2008, defendant filed a motion to exonerate the bond claiming the trial court had failed to declare the bond forfeited in open court as required by Penal Code section 1305, subdivision (a). In making this assertion, defendant relied on the reporter's transcript of the proceedings, which does not reflect the court making the forfeiture declaration in open court. County counsel responded that granting defendant's motion would be unjust, elevating form over substance, because "by releasing the bench warrant for service and increasing the bail to \$150,000.00, the judge clearly ruled on the record (as confirmed by the Clerk Minutes) that the bond was forfeited." County counsel did not contend that the declaration of forfeiture had been made in open court.

The motion was heard on June 25, 2008. After reviewing the parties' arguments, the court denied the motion, stating, "[T]he

fact that the words, 'the bond is forfeited,' do not appear in the transcript are not themselves dispositive. The transcript is presumed to be the record of the actions. However, I will tell you that on those rare occasions where I may forget to say, 'and the bond is forfeited,' fortunately I have a person sitting right here at my right hand who jogs my memory and always asks, is the bond forfeited? Sometimes that may or may not appear on the record. [¶] To my knowledge I have never known her to check the box that says the bond is forfeited without first asking here in court at the time, is the bond forfeited. [¶] I entertain a strong suspicion that that's exactly what happened here. I was asked, 'Is the bond forfeited? And [I] said, 'Yes.' [¶] But by that time we may have moved on to other things. It does not appear in the transcript and I'm going to deny the motion."

DISCUSSION

Penal Code section 1305, subdivision (a) provides: "(a) A court *shall in open court* declare forfeited the undertaking of bail or the money or property deposited as bail if, without sufficient excuse, a defendant fails to appear for any of the following: [¶] (1) Arraignment. [¶] (2) Trial. [¶] (3) Judgment. [¶] (4) Any other occasion prior to the pronouncement of judgment if the defendant's presence in court is lawfully required. [¶] (5) To surrender himself or herself in execution of the judgment after appeal." (Italics added.)

In denying defendant's motion, the court relied on *People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, in which the

court was faced with a situation in which there was no reporter's transcript of the forfeiture proceedings because no court reporter was present. (*Id.* at p. 707.) The clerk's minutes reflected bail was declared forfeited, but did not specify that the declaration had been made in open court. (*Ibid.*) In that context, the court held that the record need not show "the circumstances that the declaration occurred in open court." (*People v. Allegheny Casualty Co., supra*, 41 Cal.4th at p. 706.) However, the opinion also makes clear, "[o]f course, if a court reporter is present in the courtroom, these proceedings also eventually may be transcribed and the court's compliance (or lack of it) with the declaration-in-open-court requirement will be evident on the face of the transcript." (*Id.* at p. 714, fn. 5.)

Here, we do not have a situation like *Allegheny* in which there are clerk's minutes which reflect bail forfeiture but there is no reporter's transcript. Rather, we have a reporter's transcript which does not reflect bail forfeiture and clerk's minutes which do.

"It may be said that as a general rule that when . . . the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to the greater credence (citation). Therefore, whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case." (*In re Evans*

(1945) 70 Cal.App.2d 213, 216.) Under the circumstances of this case, we find the reporter's transcript is entitled to greater credence.

With the exception of the declaration of bond forfeiture, the reporter's transcript reflects everything done at the hearing that the clerk's minute order reflects. Specifically, the lifting of the stay on the bench warrant and the setting of the motion to relieve counsel. There is no mention in the record of bail status being revoked nor is there any mention of the bond being forfeited. There is nothing in the record which suggests any of the proceedings in open court were held outside the presence of the court reporter or not reported for any reason.

The court's statements in denying the surety's motion to exonerate the bond do not convince us that the declaration of forfeiture was made in open court. The court stated only that the clerk would not have "check[ed] the box that says the bond is forfeited without first asking here in court at the time [¶] I entertain a strong suspicion that that's exactly what happened here. I was asked, 'Is the bond forfeited?' And [I] said, 'Yes.' [¶] But by that time we may have moved on to other things." That is not the same as saying that the declaration was made in open court. Rather, it only says that the clerk may not have acted of her own accord.¹

¹ Too often clerical staff of trial courts attempt to correct errors or make a judge look good by putting matters in the minutes or abstract that are not pronounced on the record or in

"The plain language of the amended statute indicates in order for bail to be forfeited a trial court must (1) make a declaration of forfeiture stating 'bail is forfeited' (2) on the record while court is in session. The Legislature's use of the word 'shall' signifies this dual requirement is mandatory." (*People v. National Automobile & Casualty Ins. Co.* (2002) 98 Cal.App.4th 277, 283.) "[W]here a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations, an act beyond those limits is in excess of its jurisdiction.'" (*People v. Surety Ins. Co.* (1973) 30 Cal.App.3d 75, 79, quoting *People v. Black* (1961) 55 Cal.2d 275, 277.)

The statute required the court to declare the bond forfeited on the record while court was in session. The record reflects the court did not do so. After the court failed to act in accordance with the statute, the court "no longer retained 'statutory control and jurisdiction over the bond [citation], which was exonerated by operation of law. Consequently, the court's ensuing judgment was void, and ""thus vulnerable to direct or collateral attack at any time.'" [Citation.]" (*People v. Amwest Surety Ins. Co.* (2004) 125 Cal.App.4th 547, 554.)

open court by the judge. In a bail forfeiture setting, a far better way to accomplish this objective is to gently remind the judge while still on the record and in open court that the judge failed to take certain actions.

DISPOSITION

The order denying the motion to vacate forfeiture and exonerate bond, and the order entering summary judgment on the bond are reversed. The cause is remanded to the trial court with directions to vacate its orders and enter a new order granting the motion and discharging the forfeiture. Each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

ROBIE, J.

We concur:

SCOTLAND, P. J.

BLEASE, J.